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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-803

WILLIAM G. BARRY, et al. - - - Appellants

versus

JOHN BARCHI - - - - - - - Appellee

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

— and —

BRIEF *AMICUS CURIAE* OF THE HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, the Horsemen's Benevolent and Protective Association respectfully moves for leave to file as *amicus curiae* the accompanying brief in support of the position of appellee in this proceeding.

Counsel for appellee have consented to the filing of the brief. Counsel for appellants have not consented.

The Horsemen's Benevolent and Protective Association ("HBPA") is a nonprofit organization representing more than fifty thousand trainers and owners of thoroughbred horses in the United States, Puerto Rico and Canada. It is fair to say that virtually all thoroughbred trainers and owners are HBPA members. The HBPA, in addition to the management of certain benevolent and protective activities on behalf of its members, frequently represents the general interests of thoroughbred trainers and owners before boards of track stewards, racing commissions and legislative bodies.

Because the HBPA represents the overwhelming majority of thoroughbred trainers subject to summary discipline at the hands of track officials, the HBPA believes it can contribute significantly to the Court's consideration of the issues in this proceeding, in much the same way that an international union may be able to visualize and stress the importance of a particular labor law question to the national labor movement better than the local union and a small company that are parties to the controversy. *Cf.* R. Stern & E. Gressman, *Supreme Court Practice* 320 n. 87 (4th ed. 1969). Moreover, the HBPA believes that the accompanying brief *amicus curiae* addresses (1) the question of the functional appropriateness of a pre-suspension hearing; and (2) the question of the proper scope of the entitlement doctrine, more directly than the briefs of

the parties. The HBPA therefore requests leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION

STATEMENT OF THE CASE

The question in this case is one of timing. Section 8022 of the New York Unconsolidated Laws permits the New York State Racing and Wagering Board ("NYSRWB") to suspend summarily the license of a trainer of harness horses. The trainer may subsequently contest the suspension at a hearing where he

can claim a number of procedural protections, including the right to be represented by counsel, the right to present evidence, and the right to a written decision based on the record. During the conduct of the hearing, the suspension remains in full force and effect. The question is simply whether the hearing already guaranteed by law must be held before the suspension takes effect, or whether the NYSRWB can continue to impose suspensions without affording trainers any opportunity prior to the suspension to respond to the charges against them.

In harness racing, horses are tested for improper medication both before and after the race. In thoroughbred racing, horses are tested for improper medication only after the race. The test may even be performed and the results made available several days after a race. The pari-mutuel payoffs to track patrons are unaffected in either event. If a pre-race test discloses improper medication, the horse is scratched. If a post-race test discloses improper medication, only the owners' purse is affected; track patrons have long since cashed their winners and shredded their losing tickets.

ARGUMENT

I. The Due Process Clause Requires That a Trainer Be Afforded a Hearing Prior to Imposition of a Disciplinary Suspension.

A. *The Nature of this Controversy.* The question before this Court is not whether an informal or abbreviated administrative hearing may, in some cases, satisfy the requirements of the due process clause. Of course it might. *E.g., Goss* v. *Lopez,* 419 U. S. 565, 584 (1975). Rather, the question is whether the due process clause requires that a trainer be afforded a meaningful opportunity (1) to contest charges that a horse under his care has received improper medication; and (2) to explain his role in the matter, before the imposition of disciplinary suspension by track officials.

We emphasize that neither section 8022 nor the administrative regulations promulgated thereunder limit the power of track officials to impose pre-hearing suspensions. The New York Court of Appeals has confirmed that section 8022 authorizes "on-the-spot sanctions and penalties in advance of hearings," *Tappis* v. *New York State Racing and Wagering Board,* 36 N. Y. 2d 862, 863, 331 N. E. 2d 697, 698 (1975). The three-judge court found specifically that appellee Barchi "was not given access to the [drug] analysis [or] the specimen, and was never confronted with the circumstances under which it was taken." J.S. at 6a.[1]

[1]The Jurisdictional Statement will be cited as "J.S."

The contention that Barchi was granted an "informal conference-type 'opportunity to be heard,' " Brief for Appellants at 14 (citation omitted), and the suggestion that bureaucratic delay of track officials be transmuted into action "with that deliberate care which characterizes due process," Brief *Amicus Curiae* of NYRA at 7, must therefore be regarded as disingenous at best.

B. *Other License Cases and the Requirement of Pre-Suspension Hearings.* The case that most closely parallels this controversy is *Bell* v. *Burson,* 402 U. S. 535 (1971). There, a Georgia statute provided that an uninsured motorist's driver's license should be suspended unless following an accident he posted security to cover damages claimed by the other parties. The statute "excluded consideration of the motorist's fault or liability . . . from the administrative hearing conducted prior to the suspension." 402 U. S. at 535-536.

The *Bell* Court first held that due process required the administrative hearing to include a "determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee," 402 U. S. at 540. The Court then rejected Georgia's "argument that it [need not] afford the licensee an inquiry into the question of liability . . . prior to the suspension of the license." 402 U. S. at 542. Instead, the Court held:

> "While 'many controversies have raged about . . . the Due Process Clause,' it is fundamental

> that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (402 U. S. at 542) (emphasis in original)

The rule of *Bell* v. *Burson*—that some kind of hearing must ordinarily precede the deprivation of a protected property interest—remains unchanged by the Court's recent decision in another license case, *Dixon* v. *Love*, 431 U. S. 105 (1977). In *Dixon*, the Court held that the due process clause did not prohibit the summary revocation of the driver's license of an operator whose license had three times been properly suspended. 431 U. S. at 115. Appellants attempt to impress *Dixon* into the service of the proposition that "a statute which authorizes the summary suspension of a license to engage in an occupation or other activity which is subject to strict public regulation, but with an opportunity for a prompt [post-suspension] hearing before the licensing authority, has long been recognized as conforming to the requirements of due process," Brief for Appellants at 11-12.

Dixon v. *Love* cannot be freighted with that doctrinal burden. Mr. Justice Blackmun's opinion for the Court took pains to point out that revocation of the driver's license, under the applicable statute and regulations, was mandatory after three fully-adjudicated suspensions. 431 U. S. at 109 (quoting regulation), 111

n. 8 (interpreting regulation), 113 (barring possibility of "clerical error" in reporting suspensions, "revocation decisions are largely automatic"). The concurring opinions leave no doubt that the revocation of a driver's license was, in *Dixon*, understood by the Court to be an automatic substantive penalty imposed after the third fully-adjudicated suspension, and not a new proceeding designed to determine additional facts necessary to support an additional penalty. 431 U. S. at 117 (Stevens, J., concurring), 118 (Brennan, J., concurring in result); *see* 431 U. S. at 144 n. 10 (majority opinion) (hardship exceptions available only after revocation order is finalized).

A host of factors distinguish this case from *Dixon* v. *Love* and, conversely, strengthen the relationship between this case and *Bell* v. *Burson*. First, in *Dixon* v. *Love* a driver could obtain relief from the revocation order on the basis of a "commercial driver" or "hardship" exemption. In this case, no exemptions are available. Indeed, the statute precludes track officials from even granting a stay of the suspension pending the hearing. Thus a suspended trainer is precisely like the minister in *Bell* v. *Burson* who, without any prior opportunity to contest his fault or liability, was deprived of a license the "continued possession [of which had] become essential in the pursuit of a livelihood." 402 U. S. at 539. Second, the license revocation in *Dixon* v. *Love* was predicated on three prior suspension proceedings. The chance of an erroneous deprivation of a protected interest loomed no larger than the remote

possibility of clerical error. 431 U. S. at 113-114. In this case, however, suspension was a discretionary measure; the accuracy of test results was not confirmed; and the trainer's knowing participation in the alleged incident was rebutted by two lie-detector tests. The pre-hearing suspension of trainers thus seems quite similar to the unsubstantiated assumption of fault that underlay the Georgia scheme struck down in *Bell* v. *Burson*. Finally, the license revocation in *Dixon* proceeded according to a specific administrative regulation that eliminated the possibility of arbitrary action by making revocation automatic. *See* 431 U. S. at 113-115. In this case, no self-imposed regulations cabined track officials' discretion. The steward enjoyed an unfettered discretion in deciding whether the circumstances warranted suspension. This case thus closely resembles *Bell* v. *Burson*, where the suspension could be stayed pending the relatively open-ended discretionary judgment of an administrator that the driver had "filed . . . evidence satisfactory to [the administrator] that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments." 402 U. S. at 536 n. 1.

Cases cited by appellants fail to support the bald claim that the "Court has repeatedly held that an opportunity to be heard need not be given until some time after" the deprivation of a protected property interest, Brief for Appellants at 12-13. *Board of Regents*

v. *Roth*, 408 U. S. 564 (1972), held that no constitutionally protected property or liberty interests had been taken from the claimant. The plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) held that no deprivation of a protected interest had occurred. *See* 416 U. S. at 154 (1974) ("bitter with the sweet"). Justices Blackmun and Powell concurred in the result in *Arnett* on the ground that the procedural protections available to the employee prior to dismissal "comport[ed] with due process," 416 U. S. at 171, and not on the ground that—as in the instant case—the individual was entitled to *no* due process protection prior to the suspension. *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), similarly held only that an administrative hearing based on written evidence from both sides, rather than a full dress evidentiary hearing, satisfied the requirements of due process implicated in the termination of disability benefits. The *Mathews* Court in no way suggested that the benefits could be constitutionally terminated without *any* hearing. *See* 424 U. S. at 325 n. 4, 339-347.

The prisoners' rights cases of *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montayne* v. *Haymes*, 427 U. S. 236 (1976), do not reach to the constitutional question raised by this case. In both cases, the Court's decision turned on the definition, identification and existence of a protected interest—rather than upon the determination of what procedures are required by due process. *See* 427 U. S. at 226-229 (*Meachum*); 427 U. S. at 242 (*Montayne*). The school discipline case of

Ingraham v. *Wright,* 430 U. S. 651 (1977), is likewise properly read as holding that no protected interest was infringed, since the student's liberty interest was qualified by the school's "common-law privilege" of inflicting reasonable corporal punishment. *See* 430 U. S. at 676 ("there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege").

A pointillist view of the Court's major due process decisions reveals, contrary to appellants' ascertions, that *Bell* v. *Burson's* proclamation that "it is fundamental that except in emergency situations . . . [the state] must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective," 402 U. S. at 542 (emphasis in original), has not been undercut. We submit that the three-judge court's uncontested findings that trainers "cannot recapture the racing opportunities lost by missed meetings," that "an owner will immediately seek the services of another trainer so that the horse is not barred from racing," and that the "change [to another trainer] is often permanent," J. S. at 7a, causing an "irremediable" loss of current income and future business opportunities, make the facts of this case analytically indistinguishable from the loss of livelihood that forms the common bond in a large number of the Court's cases requiring or approving pre-deprivation hearings of one form or another. *E.g., Goldberg* v. *Kelley,* 397 U. S. 254 (1970) (termination of welfare benefits); *Sniadach* v. *Family Finance*

Corp., 395 U. S. 337 (1969) (garnishment of wages); *Bell* v. *Burson,* 402 U. S. 535 (1971) (suspension of driver's license "essential in the pursuit of a livelihood"); *Arnett* v. *Kennedy,* 416 U. S. 134 (1974) (termination of government employment); *Mathews* v. *Eldridge,* 424 U. S. 236 (1976) (discontinuance of disability benefits received in lieu of wages).

Moreover, the deprivation suffered here is "irremediable," J. S. at 7a. Unlike the employees in *Arnett* and *Sniadach* or the beneficiaries in *Goldberg* v. *Kelley* and *Mathews* v. *Eldridge,* who could at least be compensated by the payment of retroactive wages or benefits if the deprivation proved erroneous, a trainer cannot recoup lost earnings caused by an erroneous suspension. The purses awarded for races held during the suspension will have been distributed among those owners and trainers who participated. *See* J. S. at 7a.

We consider it more than strange that appellants fail even to mention the Court's most recent due process decision, *Memphis Light, Gas and Water Division* v. *Craft,* 46 U.S.L.W. 4398 (U. S. May 1, 1978), in their brief, because in that case the Court reaffirmed that "[o]rdinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." 46 U.S.L.W. at 4403. Appellants' claim that the "Court has repeatedly held that an opportunity to be heard need not be given until some time after" the deprivation of a constitutionally protected property interest, Brief for

Appellants at 12, neither commands the support of the cases specifically relied upon by appellants, nor comports with the established principles of due process jurisprudence, including a decision rendered the very month appellants filed their brief in this Court.

C. *Interest Balancing and Summary Suspensions.* Appellants' righteous indignation, *see* Brief for Appellants at 19 ("blatant fraud upon the public and other participants . . . gross disservice to the State"), seems rather overweening. Appellants apparently confuse the state's interest in honest racing with the state's interest in suspending a trainer before a hearing rather than after. A determination to focus on the interests implicated *in the interim* between suspension and hearing must, instead, guide the balancing of the trainer's interest in a pre-suspension hearing against the state's interest in summary action.

The trainer's interest in avoiding an erroneous suspension could hardly be greater. During the period of suspension, his loss of income is total and irremediable and he loses future business when owners make what are likely to be permanent shifts to other trainers. *See* J. S. at 27a. These findings were not disputed in the district court, *see id.*, nor are they challenged in this Court, *see* Brief for Appellants at 15.

The interests advanced by the state, on the other hand, could all be as well served by suspensions following a hearing as by summary suspensions. The interests identified by appellants are (1) protection of the integrity of racing; (2) protection of the animal;

(3) protection of the fisc; and (4) deterrence. Since discovery of illegal medication will in no way change the pari-mutuel payoff, the state's interest in ensuring that the public perceives racing to be conducted fairly is adequately served by an effective system for testing horses and punishing wrongdoers, not by the imposition of suspensions prior to a hearing. Similarly, since the animal has already received medication, the state's interest in protecting the animal is unaffected whether or not the hearing precedes the suspension.

The same can be said for the state's interest in protection of the fisc. If the state's interest here is in continued public patronage of tracks from which the state receives a share of the pari-mutuel handle, the analysis is identical to the analysis above of the state's interest in preserving the reputation of racing for fairness. And if the state's interest is in avoiding unnecessary expense, it is not present in this case: the question is not whether a hearing will be eventually afforded the trainer—it is merely a matter of timing.

A similar focus on interests in the interim also disposes of the state's claimed interest in deterrence. Surely it proves too much to contend that unjustified summary suspensions are a realistic deterrent to wrongdoing by trainers. Random imprisonment or execution of individuals has never been thought to deter crime. Instead, the state's interest in deterrence is served by a comprehensive system of testing and prosecution which ensures that those guilty of administering improper medication will be discovered and punished ap-

propriately. Whether that punishment occurs before or after a hearing is immaterial to the effectiveness of the deterrent.

A hard-pressed steward might conjure up one interest that the state has in summary suspensions as opposed to suspensions after a hearing. He could contend that summary suspensions are necessary to prevent repeat violations in the interim between suspension and the hearing by a trailer brazen enough to go double or nothing. As a factual matter, this possibility seems remote. But more importantly, it is irrelevant. If the state believes that repeat violations are a realistic possibility, it can simply accelerate the hearing date, making good on appellants' boast that a trainer can receive "a full, quasi-judicial hearing within a few days" of the test, Brief for Appellants at 11.

Indeed, a brief review of the state's treatment of this case belies appellants' assertions that the state has a significant state interest in imposing suspensions before rather than after the hearings guaranteed by law. Appellee Barchi was not informed by the presiding steward of the test results until two days after the race. J. S. at 6a. Another sixteen days passed before track officials actually suspended appellee's license. J. S. at 7a. Thus, in contrast to appellants' claim that summary suspensions are necessary "to protect the integrity of racing and the state's revenues against fraud, conflict of interest, racketeering and violence," Brief for Appellants at 11, the state's actual performance

demonstrates little concern that any member of that parade of horribles would appear during the eighteen days between the race and Barchi's suspension.

II. The Entitlement Doctrine Does Not Authorize Summary Suspensions in Regulated Industries.

A. *The Entitlement Doctrine and the Procedures Required by Due Process.* Appellants have not contested whether Barchi's license to train and race horses in New York and his right to be free of unjustified and arbitrary governmental interference with earning his livelihood, are interests protected by due process. Nor do appellants seriously contend that the state's interest in summary suspensions (as opposed to an effective disciplinary system) outweigh the trainer's interest in avoiding erroneous prehearing suspension. Rather, appellants attempt to circumvent the issue by taking a right-privilege detour:

> "[A]ppellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity. . . . Having chosen to work in this strictly regulated industry and having accepted the benefits of a license, appellee should be precluded from challenging the conditions of his licensure, including the procedures under which he is subject to being disciplined." (Brief for Appellants at 11.)

It is difficult to construe this language as anything more than an attempt to resurrect the rights-privileges doctrine. That doctrine classified public benefits such

as government employment and welfare as "privileges" rather than "rights," and held that individuals could not claim these "privileges" as constitutionally recognized interests protected by the due process clause. The doctrine therefore obviated the inquiry into what procedures might be required by due process, since *ex hypothesi* no deprivation of life, liberty or property had been effected. *See generally* VanAlstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). But ever since the explicit rejection of the rights-privileges notion in *Goldberg* v. *Kelley,* 397 U. S. 254, 262 (1970), the Court has repeatedly eschewed the doctrine. *See, e.g., Board of Regents* v. *Roth,* 408 U. S. 564, 571 (1972); *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972); *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971).

Bell v. *Burson,* 402 U. S. 535 (1971), provides a rather complete refutation of appellants' contention that "appellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity." The factual parallels between *Bell* and this case could hardly be more exact. Both cases involved licenses "essential in the pursuit of a livelihood," *Bell* v. *Burson,* 402 U. S. 535, 539 (1971); *accord,* J. S. at 7a (district court opinion). Like the statute involved here, the Georgia statute in *Bell* v. *Burson* provided for the issuance of licenses and established a procedure for their suspension. Georgia made an argument analytically identical

to that made by appellants here, but the Court explicitly rejected it:

> "The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. . . . But . . . . it is clear that liability . . . plays a crucial role in the Safety Responsibility Act. . . . Thus, we are not dealing here with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." (402 U. S. at 541)

Appellants contend that the legislature's decision to statutorily authorize pre-hearing suspensions ends the due process inquiry. Brief for Appellants at 15 ("The Legislature in permitting this otherwise illegal activity has determined that possible irreparable injury must be subordinated to the public interest in the proper conduct of the regulated activity."). But in every case where the procedures required by due process are in question, some legislative body has determined that the requested procedure is not in the public interest. If the due process decisions of this Court teach any lesson, it is that the judiciary must make an independent determination of the relative weights of the state and individual interests involved.

The only authority upon which appellants rely for their treatment of this issue is the plurality opinion in

Arnett v. *Kennedy,* 416 U. S. 134, 152-154 (1974). But a majority of the *Arnett* Court clearly indicated its disagreement with the idea that a state's plenary power to limit substantively the extent of an entitlement necessarily includes the power to condition that entitlement upon the acceptance of specific procedural limitations upon the enforcement of an individual's rights. *Arnett* v. *Kennedy,* 416 U. S. 134, 166-167 (Blackmun and Powell, JJ., concurring in result); *id.* at 177-178 (White, J., concurring in part and dissenting in part); *id.* at 206-227 (Marshall, Douglas and Brennan, JJ., dissenting.)

B. *An Inappropriate Extension of the Entitlement Doctrine.* Even if the Court now decides to accept the doctrinal formulation of the *Arnett* plurality opinion, the result in this controversy should be no different. What the state argues for here amounts to the suggestion that a state may license away the due process clause.

The government's increasingly important role as the source of a livelihood or of an income supported by public welfare generated the entitlement doctrine.[2] This created a relationship of dependency between the government and its employees or welfare beneficiaries. Individuals in turn relied on the continued availability of public largess and structured their expectations and activities in order to qualify for governmentally distributed goods and opportunities.

[2]The following discussion draws substantially on Note, *The Supreme Court—1975 Term,* 90 Harv. L. Rev. 56, 86—104 (1976).

The entitlement doctrine was adopted in an effort to limit the reach of the rights-privileges doctrine which allowed the government to deprive a citizen of public benefits without the procedural safeguards constitutionally required prior to action such as arrest or confiscation of property. The adoption of the entitlement doctrine as a means of defining a new species of property interests protected by due process thus signaled the Court's determination to limit the ability of the state arbitrarily to take from citizens the wealth and the opportunities required for the enjoyment of life in a modern welfare state.

But the entitlement doctrine was never meant to be the sole source of the interests protected by due process. The function of the doctrine, instead, has been to identify those situations in which elements of citizen expectation, dependency and reliance combine in a fashion sufficient to generate the kind of property interests that have traditionally been afforded due process protection regardless of positive state law. This much is apparent from the subject matter of the cases in which the doctrine has figured most prominently. *E.g., Memphis Light, Gas and Water Division* v. *Craft,* 46 U.S.L.W. 4398 (U. S. May 1, 1978); *Bishop* v. *Wood,* 426 U. S. 341 (1976) (public employment); *Meachum* v. *Fano,* 427 U. S. 215 (1976) (conditions of incarceration); *Goss* v. *Lopez,* 419 U. S. 565 (1975) (public education); *Perry* v. *Sindermann,* 408 U. S. 593 (1972) (state employment); *Board of Regents* v. *Roth,* 408 U. S. 564 (1972) (same); *Bell* v. *Burson,* 402 U. S. 535

(1971) (operation of motor vehicle); *Goldberg* v. *Kelley,* 397 U. S. 254 (1970) (welfare benefits).

The state's argument in this case, however, constitutes an unwarranted extension of the entitlement doctrine. Indeed, it inverts the entitlement doctrine. The doctrine has been employed as a means of defining new property interests to be protected against arbitrary state deprivation. The state now contends that by the simple expedient of deciding to license a particular occupation, it can scuttle any claims to constitutional protection not included in the licensing statute. Surely that is a proposition too extravagant to be maintained.

There can be no doubt that revolutionary America believed that fundamental, inalienable rights and liberties existed irrespective of the positive law of government. "Such rights and liberties, said John Dickinson in 1776, were 'not annexed to us by parchments and seals . . . [T]hey are founded on the immutable maxims of reason and justice.' " G. Wood, *The Creation of the American Republic,* 1776-1787, at 293 (1969). In *The Ideological Origins of the American Revolution* 78 (1967), Bailyn confirms that Americans recognized that

> "the provision of English law did not and properly could not wholly exhaust the great treasury of human rights. No documentary specifications ever could. Laws, grants, and charters merely stated the essentials . . . insofar, and only insofar, as they had come under attack in the course of English history. . . . To claim more, to assert

> that all rights might be written into a comprehensive bill or code was surely, James Otis declared, 'the insolence of a haughty and impervious minister . . . the flutter of a coxcomb, the pedantry of a quack, and the nonsense of a pettifogger.' "

The state eloquently explains how racketeering, corruption and violence in the past necessitated that the state play some role in the regulation of racing. Brief for Appellants at 6-10. A similar, but less extreme, possibility of fraud upon and injury to the public interest has required the states to regulate and license the practice of medicine and the practice of law. But we find it difficult to believe that the entitlement doctrine would permit the states to summarily suspend the licenses of attorneys and physicians—or any other licensed businesses—simply because the licensing statutes purported to give state authorities the power to suspend licenses without affording a licensee the opportunity to contest the suspension. Certainly a trainer of harness horses can expect no less.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1978, three copies of this Motion and the accompanying Brief *Amicus Curiae* were mailed, postage prepaid, to Attorney General Louis J. Lefkowitz, Two World Trade Center, New York, New York 10047, Counsel for Appellants, and to Mr. Joseph A. Faraldo, 125-10 Queens Boulevard, Kew Gardens, New York 11415, Counsel for Appellee. I further certify that all parties required to be served have been served.

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